In The

Supreme Court of the United States

October Term, 1995

CALVIN GREGORY, an individual; and DOES 1 through 50, inclusive,

Petitioners,

vs.

JOSE R. FLORES and GENIE FLORES, individually and as husband and wife,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is the injunction imposed by the trial court creating barriers to petitioner's access to California courts and governmental authorities an unconstitutional prior restraint on petitioner's First Amendment right to petition for redress?

2. Does the scope of First Amendment protection prevent the assertion of a claim for civil damages against petitioner for the exercise of his First Amendment right to petition for redress?

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CITATIONS TO UNOFFICIAL JUDGMENTS, ORDERS AND OPINIONS

The Superior Court for the State of California, County of Ventura by the Honorable Frederick A. Jones, Judge rendered its final judgment for plaintiffs on return of a general jury verdict in Case No. 126869 on 25 July 1994. The California Court of Appeals, Second Appellate District, Division Six filed its unpublished decision under case 2 Civil No. B087197 on 19 September 1995. The California Supreme Court denied petitioner's petition for review on 29 November 1995. All of the above appear in the appendix hereto.

BASIS FOR JURISDICTION OF THIS COURT

The California Supreme Court denied petitioner's petition for review on 29 November 1995. This petition involves state action repugnant to petitioner's First Amendment rights over which this court has jurisdiction under 28 U.S.C. section 1257(a).

The constitutional provisions involved in this case are the First Amendment and the Fourteenth Amendment, Section 1 which are set out verbatim below:

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

A. Nature of Action and Relief Sought

Plaintiffs' action based on theories of malicious prosecution, negligence, defamation, intentional infliction of emotional distress, negligent infliction of emotional distress, false arrest/imprisonment and injunctive relief arises out of defendant's citizen arrest of and the criminal prosecution of plaintiff Jose Flores for having a loud and obnoxious dog. Plaintiffs seek general damages, special damages, punitive damages, attorneys fees, costs of suits and preliminary and permanent injunctions (CT vol. 1 1-28).

B. Judgment of the Superior Court

The Superior Court of California, County of Ventura, by the Honorable Frederick A. Jones, Judge rendered its final judgment for plaintiffs on return of a general jury verdict finding defendant liable in the sum $4,000 for

economic damages, which includes $1,000 for loss of earnings and $3,000 for attorneys fees and costs for defending against the criminal prosecution, and the sum of $8,000 for punitive damages. Judge Jones further permanently enjoined defendant from:

1. Mailing or causing to be delivered to plaintiffs any written, audio or video material and any direct communication with plaintiffs;

2. Provoking or instigating the barking of any dog in his neighborhood;

3. Participating in or requesting a citizen arrest of the plaintiffs, and each of them; and

4. Filing any new litigation against plaintiffs, and each of them, in propria person without leave of the court or the presiding judge of the court wherein the litigation is proposed to be filed.

5. Reporting any act or omission by plaintiffs to any agency without first showing the officer or employee to whom the complaint is made a copy of the judgment.

The judgment was entered on July 25, 1994 and notice of entry of Judgment was mailed to the parties by plaintiffs' attorney on July 27, 1994. A motion for new trial or judgment notwithstanding the verdict was filed on August 11, 1994 and the court denied the motion on September 9, 1994. Notice of Appeal from the judgment and order denying the judgment notwithstanding the verdict was timely filed on September 23, 1994.

Petitioner appealed from a judgment that finally disposed of all issues between the parties and the denial of defendant's motion for judgment notwithstanding the

verdict. The Court of Appeal, Second Appellate District, Division Six affirmed the verdict in an unpublished opinion filed on September 19, 1995. On November 29, 1995, the California Supreme Court denied petitioner's petition for rehearing of the Court of Appeal's decision.

Petitioner raised the constitutional issues at the trial court level in motions for judgment notwithstanding the verdict and new trial. The Court of Appeal addressed the issues in its opinion at pages 13-15.

C. Statement of Facts

Calvin Gregory has lived in the Wildwood area of Thousand Oaks, California for approximately 15 years. He had a few problems with neighborhood dogs, but has not experienced anything like the noise caused by the dog owned by his new neighbors, the plaintiffs.

Mr. Gregory lives at 3307 Big Cloud Circle and the plaintiffs live at 3305 Big Cloud Circle, an adjoining house that is only five feet away from Mr. Gregory's bedroom.

The noise problem caused by plaintiffs' dog began as soon as it arrived in early June 1992. The dog barked every time someone or something passed by its house, approximately 85 times a day. The dog barked constantly every day with breaks that lasted from a few seconds to ten minutes. The dog would begin barking at between 7:00 a.m. and 8:00 a.m. and continue to 6:00 p.m. and sometimes barked as late as 8:00 p.m. The barking became so bad that it interfered with the insurance business that Mr. Gregory had run from his home for years.

[A few of Mr. Gregory's neighbors testified that the Flores' dog did not bother them. One neighbor could not distinguish the bark of the Flores' dog, one neighbor was not home much of the time, and the others were dog owners and lived several houses away from the noise]

On June 15, 1992, Mr. Gregory approached plaintiff Jose Flores when he inconsiderately parked his truck so as to utilize two parking spaces on a street with little street parking. When Mr. Gregory mentioned the problem to Mr. Flores, he refused to move his truck, made threatening statements and exhibited a threatening attitude. Mr. Gregory and Mr. Flores each called the police.

At the suggestion of the police officers, Mr. Gregory and Mr. Flores again attempted to talk about their differences. During this conversation, Mr. Gregory mentioned his problem with plaintiffs' barking dog. Mr. Flores told Mr. Gregory that the barking problem was caused by another dog. As the two men spoke, Mr. Flores' dog barked. [Mr. Flores testified that after he went into the house Mr. Gregory damaged his truck. He also testified that he met with Mr. Gregory without coercion and gave Mr. Gregory his telephone and pager number despite an allegedly serious leg injury.

After seeing Mr. Flores reaction to the parking discussion, Mr. Gregory felt it would be better if the dog issue was handled by the Department of Animal Control. He made a telephone complaint to the Department on or before July 8, 1992 and made a written report on or before July 28, 1992. The reports resulted in plaintiffs receiving two letters about their barking dog. The barking subsided after each complaint was communicated to plaintiffs, but

it inevitably increased to its prior level after a short period [Mr. Flores testified that he loitered around his house for a couple of work days and did not hear his dog bark and he set up a voice activated tape recorder which caught his dog barking on several occasions over a five week period. Mr. Flores is not a sound engineer. Animal control officers came out once and did not notice the barking of plaintiffs' dog.

Receiving no satisfaction from animal control officers, Mr. Gregory began anonymously sending Humane Society and ASPCA brochures addressing dog training and care to plaintiffs. [Plaintiffs claim that the material mentioned debarking although they were unable to produce such documents at trial.]

On July 18, 1994, Mr. Gregory had a telephone conversation with Deputy Sheriff Steel who had visited Mr. Gregory's home in response to complaints by plaintiffs. They claimed that Mr. Gregory was sending them brochures and asked that the police put an end to it. During the conversation, Deputy Steel stated that he noticed plaintiffs' dog barking when he visited Gregory's house and that the plaintiffs should be cited for the noise.

On Saturday, August 1, 1992, the barking of plaintiffs' dog woke Mr. Gregory before 8:00 a.m. Having had enough, Mr. Gregory went to the East Valley Sheriff's department to make a complaint and, while he was there, he spoke to Deputy Sheriff Lengyel. Mr. Gregory told Deputy Lengyel about his problem, Deputy Steel's suggestion that plaintiffs be cited, and Mr. Flores' threatening attitude.

Deputy Lengyel told Mr. Gregory that he had the option of making a police report that would be filed away and result in no action or making a citizens arrest.

Deputy Lengyel informed Mr. Gregory that he could be subject to civil liability if there is no ground or their is insufficient evidence to support the arrest or the crime. Mr. Gregory decided to make a citizens arrest.

Mr. Gregory and Deputy Lengyel drove to plaintiffs' house. As they exited their cars and approached the house plaintiffs' dog began to bark. Mr. Flores appeared at the front of the house where, in the presence of Deputy Lengyel, Mr. Gregory told Mr. Flores that he was making a citizens arrest for violation of the City of Thousand Oaks noise ordinance. Deputy Lengyel took Mr. Flores into the house, completed some paperwork and gave Mr. Flores a citation. After the citation was issued, the dog's barking subsided substantially.

Pursuant to the citation order Mr. Flores appeared in court on August 31, 1992 where a September trial date was set. The trial was continued twice, but before the second scheduled trial date, the court, on the motion of the prosecution, dismissed the prosecution in the interest of justice for economic reasons.

ARGUMENT

I.

THE TRIAL COURT'S INJUNCTION CONSTITUTES AN UNCONSTITUTIONAL PRIOR RESTRAINT ON PETITIONER'S FIRST AMENDMENT RIGHT TO PETITION HIS GOVERNMENT FOR REDRESS

Freedom of religion, speech, press, assembly, and petition are preferred rights of the Federal Constitution.[1] As this court pointed out in *United Mine Workers v. Illinois State Bar*, 389 U.S. 217 (1967) the right to petition for redress of grievances is among the most precious of the liberties safeguarded by the Bill of Rights, and this right is intimately connected, both in origin and in purpose, with the other First Amendment rights of free speech and free press, all of these, though not identical, being inseparable.

It is well settled in this court that in construing the First Amendment, it is irrelevant whether statutory rights were created by Congress or by the state, because freedom of speech, petition, and assembly under the First and Fourteenth Amendments, is, of course, as extensive with respect to assembly and discussion related to matters of local concern as it is to matters of federal concern. (*See United Mine Workers, supra*, 389 U.S. 217.) Thus, the rule is that rights protected by the First Amendment from abridgment by Congress, are among fundamental rights and liberties protected by the due process clause of the

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[1] See the annotation at 21 L.Ed.2d 976.

Fourteenth Amendment from impairment by state action, including action accomplished solely by judicial act.[2]

In fact, judicial actions through injunctions have been disfavored. In a number of decisions, this court has held that when a court enjoins activity protected by the First Amendment, whether by temporary, preliminary, or permanent injunction, this type of action falls squarely within the rubric of prior restraint.[3]

In the instant case, petitioner is burdened by a permanent injunction that all but proscribes his ability to petition his local court and government officials. He must obtain permission from the presiding judge of his local court before he can file a lawsuit in pro per against his neighbor and must give any government official to whom he complains about his neighbor, a copy of the injunction. Presumably, the judge and the government official would have the right to decide, bearing in mind the injunction petitioner handed them, whether petitioners lawsuit or complaint is legitimate. Thus, petitioner must, in essence, receive approval or a permit from the presiding judge or

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[2] *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*, 383 U.S. 413 (1966).

[3] *Vance v. Universal Amusement Co.*, 445 U.S. 308, 317 (1980) ("Nor does the fact that the temporary prior restrain is entered by a state trial judge rather than an administrative censor sufficiently distinguish this case from *Freedman v. Maryland* . . . That a state trial judge might be thought more likely than an administrative censor to determine accurately that a work is obscene does not change the unconstitutional character of the restraint if erroneously entered.")

the government official before he can file a lawsuit or lodge a complaint. Such requirements are unconstitutional prior restraints on petitioner's right to petition his government for redress as there is no justification for the imposition of these requirements and the injunction contains no procedural safeguards.

Although prior restraints are not per se unconstitutional, the immunity from prior restraint is subject to limitation only in exceptional cases. (*See Near v. Minnesota*, 283 U.S. 697 (1931.) The barriers to prior restraint remain high, since any system of classification which places a prior restraint upon expression bears a heavy presumption of invalidity and the government has a heavy burden to establish that a particular restriction amounting to a previous restraint presents such an exceptional case. (Cf. *New York Times Company v. United States*, 403 U.S. 713 (1971.)

The restrictions at bar do not present an exceptional case. The injunctions were imposed after a civil trial that resulted in the issuance of a judgment against petitioner for his alleged improvident citizens arrest of the respondent.[4] The trial court, without the benefit of findings of fact, apparently decided that petitioner abused the court system and made inappropriate complaints to government officials and developed these restrictions to cure that perceived problem. The court's conclusion appears curious considering that respondents brought the civil

[4] Respondent was never detained; he merely received a citation.

action[5] and the parties first meeting resulted, at least in part, from respondent calling the police. Notwithstanding the above, the imposed restrictions are unnecessary as the civil courts can weed out any unnecessary lawsuits through the procedural tools of demurrers and summary judgment motions. The courts even have the power to impose sanctions for frivolous filings.[6] As for government officials, their job descriptions include the analysis and prioritization of complaints brought to them by the public. The court's mandate that petitioner carry with him this scarlet letter only serves to make petitioner's positions illegitimate without consideration of the merits of his positions. Petitioner's plight is all the more troubling in light of the lack of remedies for the improper exercise of discretion by the presiding judge and government officials.

A system of prior restraints runs afoul of the First Amendment where it lacks the following safeguards: (1) the burden of instituting judicial proceedings, and proving that the right is unprotected, must rest with the censor; (2) any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo; and (3) a prompt final judicial determination must be assured. (*See Southern Promotions Ltd. v. Conrad*, 420

[5] Respondents filed another civil lawsuit against petitioner alleging, among other things, that petitioner was liable under a theory of malicious prosecution for filing a cross-complaint in the initial civil suit. Respondents have settled this lawsuit for petitioner's waiver of recoverable costs.

[6] California Code of Civil Procedure section 128.5.

U.S. 546 (1975).) Not one of these safeguards is contained in the injunction.

Petitioner, therefore, requests that this honorable court dissolve the injunctions to the extent that it works as a prior restraint to his right to petition under the First Amendment.

II.

PETITIONER CANNOT BE HELD LIABLE FOR THE EXERCISE OF HIS FIRST AMENDMENT RIGHT TO PETITION HIS GOVERNMENT

The First Amendment protects an individual's right to petition his or her government. Thus, a person cannot be held liable for seeking governmental redress. (*See Eastern R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961).)

In the instant case a general verdict was entered against petitioner. The judgment was necessarily based in part on allegations stemming from petitioner's petition to public safety officials in his locality for the purpose of redressing a problem with his neighbor. Because the jury returned a general verdict, it is impossible to determine whether its basis is unconstitutional. As a result, this court should vacate the judgment and return this case to the trial court for further proceedings.

III.

CONCLUSION

The injunctions imposed by the trial court are unconstitutional prior restraints on petitioners right to petition

the government and should be dissolved. It is impossible to determine under the general verdict rendered by the jury whether petitioner found liable for exercising his First Amendment right to petition. As a result, this court should vacate the current judgment and remand the case to the trial court for further proceedings.

Dated: May 1, 1996

Respectfully submitted,

BICKERSTAFF & MCNAIR

GREGORY L. MCNAIR
Attorneys for Petitioner

EXHIBIT A

EXHIBIT A

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

JOSE R. FLORES and GENIE FLORES, Plaintiffs and Respondents, v. CALVIN GREGORY, Defendant and Appellant.	2d Civil No. B087197 (Super. Ct. No. 126869) (Ventura County) (Filed Sept. 19, 1995)

Calvin Gregory appeals from a judgment entered on a jury verdict for $12,000 damages in favor of respondents, Jose R. Flores and Genie Flores. The trial court granted respondents injunctive relief and enjoined Gregory from Harassing respondents. Respondents cross-appeal from an order granting nonsuit on a cause of action for malicious prosecution. We affirm.

Fact

Gregory and respondents live next door to one another on Big Cloud Circle in Thousand Oaks. Gregory operates an insurance business out of his home and dislikes dogs. The Flores own Punkie, a passive and well-mannered dog.

Gregory complained that the dog barked too much, and, on August 1, 1992, made a citizen's arrest of Jose Flores for violation of a city noise ordinance. (Thousand Oaks Municipal Code, § 5-21.03.)[1] The city attorney dismissed the criminal charges approximately two months later.

On June 30, 1993, respondents brought suit against Gregory for malicious prosecution, negligence, defamation, intentional infliction of emotional distress, negligent infliction of emotional distress, false arrest/ false imprisonment, and injunctive relief. Gregory denied liability and filed a cross-complaint for nuisance and intentional infliction of emotional distress.

The Trial

Jose Flores testified that Gregory first confronted him on June 15, 1992. Flores had just returned from the doctor and parked his company truck in front of Gregory's house. Gregory ran up to the truck with a chain around his waist and banged on the truck window. He demanded that Flores move the truck. Flores, who was on crutches, declined to do so and went inside to rest.

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[1] The ordinance provided in pertinent part that "it shall be unlawful for any person to willfully make or continue to make or cause to be made or continued, or allow any animal which is kept by that person on the property which is the source of the noise, to make any loud, unnecessary, and unusual noise which disturbs the peace or quiet of any neighborhood, or which causes discomfort or annoyance to any reasonable person of normal sensitiveness residing in the area."

Flores heard a loud thump and found a dent on the side of the truck. He called the sheriff and went next door to speak to Gregory. Gregory told Flores that his dog barked loudly and that he had taken other dog owners to court. Flores gave Gregory his office and pager numbers and asked Gregory to call him if the dog caused a disturbance.

After the incident, Gregory mailed animal control literature to respondents and inscribed messages about how dogs can be surgically "debarked." The anonymous mailings alarmed respondents. Jose Flores questioned the other neighbors and decided to investigate the matter. He sat on a green belt near his home to determine whether anyone could hear the dog bark. He also set up a sound-activated tape recorder. Over a period of five weeks, the tape recorder detected the dog barking eleven times, no longer than four or five seconds at a time.

Respondents contacted animal control and asked for help. Charity Anderson, an employee for animal control, made an unannounced visit on July 8, 1992, and monitored the area. She did not hear the dog bark. Respondents circulated a petition stating that "our dog is quiet and in no way a nuisance to our neighbors."[2] Seven neighbors signed the petition.

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[2] The petition stated in pertinent part: "We have received numerous erroneous complaints through the mail regarding our pet dog from our neighbor. He continues to complain simply because he doesn't like animals and we own a dog and have recently moved in next door to him. He is inventing stores about our dog and neighborhood pets. Our dog is quiet and in no way a nuisance to our neighbors. We are frightened to leave our dog out in our backyard during the day while we are at work for fear this man may harm our pet in some way. We have spoken to our

Gregory claimed that the dog constantly barked and howled. On August 1, 1992, he lodged a complaint at the sheriff's station in Simi Valley and met with Deputy Sheriff Steven Lengyel. Deputy Lengyel told Gregory that he could file a report or make a citizen's arrest. Lengyel did not believe there was sufficient cause to make an arrest and warned Gregory that he could be civilly liable if he arrested Jose Flores. Gregory insisted on making the arrest and had Deputy Lengyel accompany him to Flores' house. Gregory arrested Flores for violating the city noise ordinance. Several neighbors witnessed the arrest.

Flores retained an attorney and appeared in criminal court. He and his wife were humiliated by the press coverage, lost sleep, and suffered severe headaches. The city attorney eventually dismissed the action. (Pen. Code, § 1385, subd. (a).)

Respondents testified that the dog did not cause a disturbance. The neighbors testified that they rarely heard the dog bark and that Gregory did not like dogs. Gregory told a neighbor, Michael Ragan, that "barking dogs were rapidly becoming the scrunge of the neighborhood." He told another neighbor, Susan Savas, that "dogs rip out people's arms and kill children." In 1991, before respondents moved into the house, Gregory sued a dog owner and asked a neighbor, Rodney Storm, to lie for him. Gregory told Storm that he was making the dog owner "crazy," that the case was going to "People's Court," and that "we would have a little bit of fun."

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neighbors and they have signed below, as they too have similar complaints."

In 1992, after Gregory arrested Flores, neighbor youths made prank calls to Gregory's residence and barked on the phone. Gregory had the calls traced and pressed criminal charges. One of the youths, Jason Kinzer, approached Gregory and apologized. Gregory offered to drop the charges if he testified against respondents. Kinzer testified that "I told [Gregory] that I would have no part of what he was asking me to do, I did not know the Floreses, let alone have any knowledge of the civil trial pending against them. He was asking me to lie to help his case."

Gregory moved for nonsuit at the conclusion of the trial. The trial court granted the motion on the first cause of action for malicious prosecution but denied the motion on the remaining causes of action. The jury, by unanimous verdict, awarded respondents $4,000 economic damages and $8,000 punitive damages. The jury found against Gregory on the cross-complaint.

The trial court granted respondents injunctive relief and entered a permanent injunction enjoining Gregory from (1) mailing, telephoning, or communicating with respondents except through counsel, (2) provoking or causing any dog in the neighborhood to continue barking, (3) encouraging, promoting, requesting or participating in the citizen's arrest of Jose Flores or Genie Flores, (4) filing new litigation in propria persona against respondents without first obtaining leave of court or the presiding judge of the court, and (5) in the event Gregory reports "any complaint relating to any conduct, act or omission by Jose Flores and/or Genie Flores with any agency, he shall present to the officer or employees to

whom that complaint is made at the time of the making of the initial complaint, a copy of this Judgment."

Gregory appealed from the judgment after the trial court denied his motion for new trial and judgment notwithstanding the verdict. Flores cross-appealed from the order granting nonsuit.

Negligence and Negligent Infliction of Emotional Distress

On review, our power begins and ends with a determination as to whether there is any substantial evidence to support the judgment. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.) Where, as here, the jury has returned a general verdict, we affirm if a single cause of action is supported by the evidence. (*Carr v. Barnabey's Hotel Corp.* (1994) 23 Cal.App.4th 14, 17.)

Gregory contends that the trial court erred in denying the motion for nonsuit on the negligence and negligent infliction of emotional distress causes of action. The complaint alleged that Gregory breached a duty "not to make false claims or file unwarranted complaints." The duty arose out of Penal Code section 148.5 which prohibited an individual from knowingly making a false report to a police officer. (*Fenelon v. Superior Court (1990)* 223 Cal.App.3d 1476, 1479, fn. 6.) Section 5-8.01 of the City of Thousand Oaks Municipal Code further prohibited Gregory from making false or fraudulent statements to the city.[3]

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[3] The ordinance stated in pertinent part: "Any person who, in any matter within the jurisdiction of any department or agency of the City, knowingly falsifies, conceals, or covers up by any trick, scheme, or device any fact, or makes any false, fictitious, or fraudulent statement or representation, or makes or uses any false writing or document when he knows the same to contain any false, fictitious, or fraudulent statement or entry shall be guilty of a violation of this Code. . . . "

Gregory asserts that no duty of care was owed because his statements were absolutely privileged. Civil Code section 47, subdivision (b)(2) provides that statements made in a judicial proceeding are absolutely privileged. Although some courts have applied the privilege to police investigations (*Williams v. Taylor* (1982) 129 Cal.App.3d 745, 753-754; *Hunsucker v. Sunnyvale Hilton Inn* (1994) 23 Cal.App.4th 1498, 1503-1504)), the better rule is that false police reports are conditionally privileged. (*Fenelon v. Superior Court, supra,* 223 Cal.App.3d at p. 1478; see also *Sanborn v. Chronical Pub. Co.* (1976) 18 Cal.3d 406, 413-414 [malice defeats "official duty" privilege].) "[T]he Legislature recognized there must be limits placed on the privilege accorded this type of communication. Thus here, where the report is made solely to the police and not in a quasi-judicial context, to be privileged the statement must be made without malice." (*Fenelon v. Superior Court, supra,* 223 Cal.App.3d at p. 1483.)

Substantial evidence was presented that Gregory maliciously lodged false complaints with the city and the sheriff to harass respondents. The conduct went beyond reporting a suspected crime. When Deputy Lengyel declined to arrest Flores, Gregory insisted on making a citizen's arrest. Where, as here, a defendant knowingly makes false accusations to instigate an unlawful arrest, he

is liable for false arrest and false imprisonment. (*Du Lac v. Perma Trans Products, Inc.* (1980) 103 Cal.App.3d 937, 943.)

We reject the argument that the causes of action for negligence, negligent and intentional infliction of emotional distress, and false arrest are part of the action for malicious prosecution. False arrest and malicious prosecution are separate torts. (*Harden v. San Francisco Bay Area Rapid Transit Dist.* (1989) 215 Cal.App.3d 7, 17; *Collins v. City and County of San Francisco* (1975) 50 Cal.App.3d 671, 676.) Civil Code section 47, subdivision (b)(2) did not immunize Gregory. (*Kimmel v. Goland* (1990) 51 Cal.3d 202, 211 [litigation privilege does not bar action for invasion of privacy].)

Intentional Infliction of Emotional Distress

To prevail on a cause of action for intentional infliction of emotional distress, a plaintiff must show that the defendant engaged in outrageous conduct. (*Fowler v. Varian Associates, Inc.* (1987) 196 Cal.App.3d 34, 44.) Gregory claims that the reports to the sheriff and animal control were privileged and do not, as a matter of law, constitute outrageous conduct. We disagree. Substantial evidence was presented that Gregory knowingly and maliciously lodged false reports to harass respondents.

Gregory, however, contends that respondents suffered no severe emotional distress. Respondents testified that they suffered loss of sleep and severe headaches, feared for the safety of the dog, and were humiliated by the arrest and press coverage. The trial court ruled that sufficient evidence was presented to submit the matter to the jury. No error occurred. (*Fletcher*

v. Western National Life Ins. Co. (1970) 10 Cal.App.3d 376, 397.) " 'Where reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability.' [Citations.]" (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 499.)

Probable Cause to Arrest

Gregory further maintains that the evidence was undisputed that he had probable cause to make a citizen's arrest. "On appeal, the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding appellant's evidence, however strong. [Citations.]" (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 283, p. 295.)

The evidence showed that respondents' dog rarely barked. Deputy Lengyel warned Gregory that there was insufficient cause to arrest Flores. When Gregory and Deputy Lengyel approached the residence, the dog was not causing a disturbance. The trial court instructed the jury that it must decide whether Gregory had reasonable cause to believe Flores had committed a public offense. (BAJI 7.66.)[4] No error occurred. Where there is a conflict

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[4] The court instructed: "An arrest is lawful if the person making the arrest has reasonable cause to believe that the person arrested had committed a public offense. [¶] The term 'reasonable cause' as used in these instructions means such a state of facts or circumstances confronting the person at the time of the arrest as would lead a person of ordinary caution or prudence to believe and conscientiously entertain a strong

in the evidence with respect to probable cause, it is the duty of the trial court to instruct the jury as to what facts, if established, would constitute probable cause for detaining the plaintiff. (*Gibson v. J.C. Penney Co., Inc.* (1958) 165 Cal.App.2d 640, 644-645.) Gregory's arguments to the contrary are without merit. "A judgment may not be reversed on appeal, even for error involving 'misdirection of the jury,' unless 'after an examination of the entire cause, including the evidence,' it appears the error caused a 'miscarriage of justice.' [Citation.]" (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574.) No miscarriage of justice occurred here.

Defamation

Gregory next asserts that the cause of action for defamation was barred because his statements were absolutely privileged. (Civ. Code, § 47, subd. (b)(2).) Gregory, however, failed to plead the privilege as an affirmative defense or request jury instructions on the issue.[5] He may not raise the issue for the first time on

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suspicion that the person arrested had committed an infraction or a misdemeanor in the person's presence or a felony." The court further instructed the jury as to what facts should be considered in determining whether Flores violated the noise ordinance.

[5] Counsel for Gregory agreed that a BAJI 7.05 conditional privilege instruction should be given. The trial court instructed the jury: "The statements you find the defendant made to others about the Flores' dog were conditionally privileged. A conditional privilege is a defense to an action for defamation, unless the defendant abused the privilege when publishing the statement. [¶] A privilege is abused when a defendant publishes

appeal. (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1065-1066.)

As discussed, Gregory's false reports to the police were not privileged. (*Fenelon v. Superior Court, supra,* 223 Cal.App.3d 1476, 1483.) The publication to persons other than the police also fall outside the ambit of an absolute privilege. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203-1204.) Substantial evidence supported the jury finding that Gregory acted with malice and defamed respondents. (*Id.*, at pp. 1213-1214.)

Juror Misconduct

Gregory argues that the trial court erred in denying the motion for new trial. The motion was based on Gregory's declaration concerning a conversation with the jury foreman. The juror allegedly told him that "there was no false arrest," but that the verdict was rendered against him because he was "not a nice guy." The court properly denied the motion for new trial. The declaration was hearsay and inadmissible. (*Burns v. 20th Century Ins. Co.* (1992) 9 Cal.App.4th 1666, 1670.)

"Evidence Code section 1150 'prevents one juror from upsetting a verdict of the whole jury by impugning his own or his fellow jurors' mental processes or reasons

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a defamatory statement about plaintiff, without a good faith belief in the truth of the statement; or without reasonable grounds for believing the statement true; or motivated by hatred or ill will towards plaintiff. [¶] Plaintiff has the burden of proving by a preponderance of the evidence all of the facts necessary to establish that the privilege was abused by the defendant."

for assent or dissent. The only improper influences that may be proved under section 1150 to impeach a verdict, therefore, are those open to sight, hearing, and the other senses and thus subject to corroboration.' [Citation.]" (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 910.) It is settled that a jury verdict may not be impeached by hearsay affidavits. (*People v. Williams* (1968) 45 Cal.3d 1268, 1318.)

Anti-Harassment Injunction

Gregory contends that the permanent injunction violates his First Amendment right to communicate his views and complain to government. Gregory claims that he has been "handcuffed" from protecting his life, liberty, and personal safety. The argument is specious. Gregory has no constitutional right to harass respondents, lodge false reports with the police and city, or make unlawful arrests. The granting of an injunction lies within the sound discretion of trial court and may not be reversed absent a clear abuse of discretion. (*Health Maintenance Network v. Blue Cross of So. California* (1988) 202 Cal.App.3d 1043, 1056.)

The injunction requires that Gregory submit a copy of the judgment if he lodges a complaint with a public agency concerning respondents. Gregory is also enjoined from communicating with respondents. We reject the argument that the injunction is overbroad or infringes on a constitutionally protected activity. Gregory is free to publicize his views but may not harass respondents. He has no constitutional right to contact respondents or disturb their peace. (*Smith v. Silvey* (1983) 149 Cal.App.3d

400, 407.) Respondents' right to exclude persons from their home is a fundamental aspect of private property ownership. (*Allred v. Harris* (1993) 14 Cal.App.4th 1386, 1390.)

Where a defendant has engaged in willful conduct, directed at a specific person that seriously alarms, annoys or harasses the person, the trial court may issue an injunction prohibiting harassment. (Code Civ. proc., § 527.6.) In the present case, Gregory filed false reports with animal control and the sheriff, dented Flores' truck, placed Flores under citizen's arrest, and mailed threatening literature. Respondents were humiliated by the press coverage, suffered emotional anguish, feared for the dog's safety, and suffered economic losses. The evidence was clear and convincing that respondents suffered substantial emotional distress and that Gregory would continue to harass respondents if an injunction did not issue. (Code Civ. proc., § 527.6, subd. (b).) This was not an isolated incident. (Compare, *Leydon v. Alexander* (1989) 212 Cal.App.3d 1, 4.)

The trial court balanced the respective interests of the parties and carefully tailored the injunction. It was not required to make specific findings before it issued the injunction. (*Ensworth v. Mullvain* (1990) 224 Cal.App.3d 1105, 1112.) "[T]he granting of the injunction itself necessarily implies that the trial court found that [Gregory] knowingly and willfully engaged in a course of conduct that seriously alarmed, annoyed or harassed [respondents], and that [respondents] actually suffered substantial emotional distress. No further express findings are required." (*Ibid.*)

Vexatious Litigant Penalty

Gregory also challenges the injunction on the ground that it imposes a vexatious litigant penalty. The trial court declined to find that Gregory was a vexatious litigant but looked to the vexatious litigant statute for guidance in fashioning a remedy. (Code Civ. Proc., § 391, et seq.) The injunction provides that Gregory may not file in propria persona actions against respondents without permission of the court. It only affects future litigation between the parties.

We reject the argument that the injunction is unconstitutional or violates Gregory's due process rights. The order was crafted to assure that Gregory does not harass respondents by filing frivolous in propria persona actions. It does not bar Gregory from filing civil actions against other defendants or require that he post a vexatious litigant bond. (Code Civ. proc., §§ 391.3, 391.4.) The court did not abuse its discretion in ordering Gregory to obtain leave of court before commencing new litigation against respondents.

Cross-Appeal: Malicious Prosecution

Respondents, in their cross-appeal, assert that the trial court erred in granting nonsuit on the first cause of action for malicious prosecution. The argument fails for two reasons. First, Genie Flores had no cause of action. The city attorney initiated a prosecution against Jose Flores. Actions for malicious prosecution are personal and do not give rise to a cause of action in anyone other than the person directly aggrieved. (*Coverstone v. Davies* (1952) 38 Cal.2d 315, 324.)

The nonsuit was proper because no evidence was presented that the criminal action was terminated in favor of Jose Flores. "The plaintiff suing for malicious prosecution of a criminal proceeding must allege and prove that it has *terminated in his* favor, either by his *acquittal* in the trial, or *dismissal* of the case, for lack of evidence. . . . [Citations.]" (5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 421, p. 505.) It is not enough to show that the proceeding was dismissed. (*Jaffe v. Stone* (1941) 18 Cal.2d 146, 150.) "If the termination does not relate to the merits – reflecting on neither innocence of nor responsibility for the alleged misconduct – the termination is not favorable in the sense it would support a subsequent action for malicious prosecution." *Lackner v. LaCroix* (1979) 25 Cal.3d 747, 751.)

The city attorney testified that the criminal action was dismissed because of budget constraints and lack of available resources. The trial court found no favorable termination. We agree. "The focus is not on the malicious prosecution plaintiff's opinion of his *innocence*, but on the opinion of the dismissing party. [Citation.]" (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 881.) Appellant's reliance of *DeLaRiva v. Owl Drug Co.* (1967) 253 Cal.App.2d 593 is misplaced. There, the dismissal "in the interests of justice" was ambiguous and the court remanded the case for further evidence concerning the reason for the dismissal. (*Id.*, at p. 600.) In the instant case, the criminal action was dismissed for reasons unrelated to Flores's innocence or guilt.

The judgment is affirmed. Respondents are awarded costs on appeal.

NOT TO BE PUBLISHED.

Yegan, J.

We concur:

STONE, P. J.

GILBERT, J.

Frederick A. Jones, Judge

Superior Court County of Ventura

Bickerstaf & McNair; Gregory L. McNair, for Appellant.

Pritz & Associates; Kurt J. Pritz, for Respondents.

EXHIBIT B

Tina L. Rasnow – Bar #113188
Tina L. Rasnow & Associates
2660 Townsgate Road, Suite 800
Westlake Village, California 91361-3001
(805) 494-0988

Attorneys for Plaintiffs JOSE R. FLORES and GENIE FLORES

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF VENTURA

JOSE R. FLORES, and GENIE FLORES, individually, and as husband and wife, Plaintiffs, vs. CALVIN GREGORY, an individual; and DOES 1 through 50, inclusive, Defendants.	CASE NO: 126869 JUDGMENT ON VERDICT Trial Date: June 30, 1994 Trial Time: 1:30 p.m. Department: 45 (Filed Jul. 25, 1994)

This action came on regularly for Trial on June 30, 1994, at 1:30 p.m. in Department 45, Tina L. Rasnow appeared as attorney of record for Plaintiffs and Cross-Defendants Jose R. Flores and Genie Flores, and Wayne Redmond appeared as attorney for Defendant and Cross-Complainant Calvin Gregory.

A Jury of twelve persons was regularly impaneled and sworn to try the action. Witnesses for both Plaintiffs and Defendant were sworn and examined. After hearing

the evidence, arguments of attorneys, and instructions of the Court, the Jury members retired to consider their verdict, and subsequently returned into Court, and, being called, answered to their names and rendered their verdict in writing, in words, and figures as follows:

Judgment in favor of Plaintiffs Jose R. Flores and Genie Flores, and against Defendant Calvin Gregory, in the sum of $1,000.00 for loss of earnings, $3,000.00 for attorneys fees incurred in defending the prior criminal proceeding, for a total of $4,000.00 in economic damages, and $8,000.00 in punitive damages against Defendant Calvin Gregory.

As to the Cross-Complaint, the Jury found in favor of Cross-Defendants Jose R. Flores and Genie Flores, and against Cross-Complainant, Calvin Gregory.

IT IS ADJUDGED that Plaintiffs Jose R. Flores and Genie Flores recover $12,000.00 from Defendant Calvin Gregory, and Cross-Complainant Calvin Gregory take nothing against Cross-Defendants Jose R. Flores and Genie Flores on his Cross-Complaint.

IT IS FURTHER ADJUDGED that a permanent injunction issue as follows:

1. Defendant Calvin Gregory is prohibited from mailing or otherwise causing to be delivered by any manner to the Plaintiffs, Jose R. Flores and Genie Flores, at their residence or any other place any writing, audio or video document on or concerning any subject whatsoever. It is further directed that Calvin Gregory shall not communicate or attempt to communicate with the Plaintiffs by telephone or by any other means at any time in

the future except through counsel for the Plaintiffs, either Tina L. Rasnow, or any other person designated by Tina Rasnow or by the Plaintiffs;

2. Defendant Calvin Gregory shall be enjoined and ordered not to provoke or instigate or cause to continue the barking of any dog, including but not limited to any dog or dogs owned by the Plaintiffs. It is expressly intended that this restraint extend the obligation of the Defendant on this subject to other animals within Defendant's neighborhood;

3. Defendant Calvin Gregory is enjoined and ordered not to encourage, promote, request and/or participate in or effect personally or otherwise any citizen arrest of either Jose Flores or Genie Flores;

4. Defendant Calvin Gregory is enjoined from and ordered not to file any new litigation against Jose Flores and/or Genie Flores in any of the Courts of this State in propria person without first obtaining leave of this Court or the presiding judge of the Court wherein the litigation is proposed to be filed; and

5. Should Defendant Calvin Gregory report any complaint relating to any conduct, act or omission by Jose Flores and/or Genie Flores with any agency, he shall present to the officer or employee to whom that complaint is made at the time of the making of the initial complaint, a copy of this Judgment.

Plaintiffs are awarded statutory costs of suit.

Judgment entered on JUL 25 1994, 1994, in the Judgment Book, Volume No. ___, Page ___.

SHEILA GONZALEZ
Clerk

By: /s/ ANGIE PEREZ
Deputy

7-21-94

/s/ FREDERICK A. JONES
Superior Court Judge

EXHIBIT C

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA
MINUTE ORDER

CASE NO: CIV126869
DATE: 07/12/94

JOSE R FLORES AND
GENIE FLORES VS
CALVIN GREGORY
TIME: 10:00
DEPT: 45

JURY TRIAL (LONG CAUSE). TIME ESTIMATE: 5-6 DAYS

Honorable FREDERICK A. JONES, Judge presiding. Clerk: SHELLEY A. BOLTON. Court Reporter: D. POTTS.

SEVENTH Day of Trial

JOSE R. FLORES, GENIE FLORES present with counsel TINA RASNOW.

CALVIN GREGORY present with counsel WAYNE REDMOND.

At 10:40 a.mn., court reconvenes.

All parties present.

Court and counsel proceed to further hearing on 7th cause of action for harassment and injunctive relief which was tried to the court concurrently with the case tried to the jury.

Plaintiffs exhibit 19 is offered; there is an objection and the objection is sustained.

Plaintiff states there is no further evidence to be presented on this issue.

Counsel duly argue.

At 10:55 a.m., the court directs a recess.

At 11:20 a.m., court reconvenes.

The court states its ruling as follows:

ON THE 7TH CAUSE OF ACTION JUDGMENT IS ENTERED FOR THE PLAINTIFFS AND AGAINST THE DEFENDANT.

1- COURT ENJOINS DEFENDANT FROM MAILING OR OTHERWISE CAUSING TO BE DELIVERED TO PLAINTIFFS AT THEIR RESIDENCE OR ANY OTHER PLACE ANY WRITING AUDIO OR VIDEO DOCUMENT AND NOT COMMUNICATE WITH PLAINTIFFS BY TELEPHONE OR ANY OTHER MEANS EXCEPT THROUGH AND DIRECTLY TO COUNSEL FOR PLAINTIFFS. 2- COURT ENJOINS DEFENDANT TO NOT PROVOKE OR INSTIGATE OR CAUSE TO CONTINUE THE BARKING OF ANY DOG INCLUDING BUT NOT LIMITED TO THE PLAINTIFFS' DOG OR DOGS. 3- DEFENDANT IS ENJOINED TO NOT ENCOURAGE PROMOTE REQUEST OR PARTICIPATE OR EFFECT PERSONALLY OR OTHERWISE ANY CITIZENS ARREST OF EITHER PLAINTIFF. 4- DEFENDANT IS ENJOINED TO NOT FILE ANY NEW LITIGATION OF THESE PLAINTIFFS OR EITHER OF THEM IN ANY OF THE COURTS OF THIS STATE IN PROPRIA PERSONA WITHOUT FIRST OBTAINING LEAVE OF THIS COURT OR THE PRESIDING JUDGE OF THE COURT THE LITIGATION IS PROPOSED TO BE FILED IN. 5- COURT DIRECTS THAT UPON THE REPORT OF DEFENDANT OF ANY COMPLAINT RELATING TO ANY CONDUCT ACTION OR

OMISSION BY EITHER OF THE PLAINTIFFS THE AGENCY OR OFFICER TO WHOM THE COMPLAINT IS BEING MADE IS TO BE PRESENTED A COPY OF THIS JUDGMENT BY THE DEFENDANT.

COUNSLE [sic] FOR PLAINTIFF TO PREPARE FORMAL JUDGMENT THAT INCORPORATES THESE ORDERS.

AT 11:43 A.M. COURT IS IN RECESS.

SHEILA GONZALEZ,
Court
Executive Officer
and Clerk

By: /s/ Shelley Bolton
SHELLEY BOLTON
Judicial Assistant

Case No:
CIV126869 07/12/94

EXHIBIT D

* * *

[p. 592] The Court then concludes that the trial to the Court on the seventh cause of action is concluded.

Ms. Rasnow, do you care to make any argument as to the seventh cause of action?

MS. RASNOW: Simply, your Honor, that if there is no injunctive relief granted that we fear a multiplicity of suits. And we are mindful of the Court's limited time and resources and the need for having some kind of final – hopefully final instruction or order that would make it clear to the defendant that to file these type of claims, false claims or claims without any corroboration is inappropriate and would put that added weight of that court order to deter such behavior in the future.

It becomes a real problem for the plaintiffs to have to come into court for multiple false arrests or harassment, so we would ask both in the interest of judicial economy and as well as to avoid multiplicity of suits for the clients that the injunctive relief be awarded.

THE COURT: Mr. Redmond, argument?

MR. REDMOND: Yes, thank you, your Honor.

Addressing first the prayer of the complaint and the [p. 593] various issues brought up, as to paragraph A, which states for harassing plaintiffs or plaintiffs' dog in any manner whatsoever, including but not limited to, instigating the dog to bark, first of all, I would state that I believe that that request is somewhat overbroad. There is no specific definition as to harassment. Other than we would agree that Mr. Gregory not instigate the dog to bark, and I don't think there is much danger of that

situation occurring anyway. But beyond that, I think it's overly broad as far as what is determined to be harassment.

As to paragraph B, leaving literature or other materials in or about plaintiffs' property, we would agree to that. That won't occur again.

Paragraph C, from filing any false claims or complaints with animal regulation and/or animal control, City of Thousand Oaks and/or the Ventura County Sheriff's Department or any other regulatory agency having jurisdiction over plaintiffs or plaintiffs' dog, again, I believe that's much too overly broad.

First of all, there has been no testimony in this case – other than Mr. Gregory – of any complaints other than those to animal regulation and/or the sheriff's department. And so I don't believe any others are justified. But if, in fact, the Court feels they are, again we come into the problem of what is a false claim or complaint and that's a determination that can only really be made after the fact. And to limit Mr. Gregory in his constitutional rights making valid complaints, I think [p. 594] would be overly broad.

Furthermore, in the proposed judgment which Miss Rasnow has submitted to the Court, she has added an additional qualification which is not asked for in the prayer, that being that Mr. Gregory be prohibited from filing any complaints with regulatory agencies or law enforcement agencies against the plaintiffs without tangible evidence or a minimum of one independent witness corroborating the complaint.

First of all, I believe this to be unconstitutional. I don't believe that that type of a prequalification can be placed on somebody making a complaint to a law enforcement agency. For example, for violation of a crime, the prosecution or the prosecutor responsible for following through on that would make the determination as to whether or not there was probable cause, there was enough evidence to proceed with the case. But if, in fact, a police officer determines to make an arrest or to cooperate in an arrest, I don't believe that Mr. Gregory can be foreclosed from doing that.

And, secondly, any other type of regulatory agencies. Again, it's way too broad. But I do believe in regards to the animal control, we had testimony to the extent that they have such a procedure and, in fact, Mr. Gregory had come up against the Step III of that procedure wherein after third complaint there was a mediation required which required the complainant to have a corroborating witness.

[p. 595] So to that extent, I think there is already the process in place for dealing with their complaints regarding animal regulation.

But, again, regarding the police, I don't believe Mr. Gregory can be hamstrung to that degree that he can't make a valid complaint. So with those couple objections, we would agree to the matter of the literature and not harassing the dog or instigate its barking.

THE COURT: Miss Rasnow.

MS. RASNOW: Well, the issue as to filing the complaint, I believe Mr. Redmond has made issues that I

think are well taken about limiting an individual's rights to file a complaint. Perhaps if the word complaint were changed to an arrest, wherein the situation here, the arresting officer did not see probable cause to make the arrest but he didn't do the arrest, he only assisted in the citizen's arrest. So perhaps instead of the word filing a complaint, it would be more appropriate to put conducting a citizen's arrest. I think that would protect my clients, would solve that problem, and we'd offer that as a compromise on the language that's contained within our proposed judgment.

As to the (A) on harassing, I think that if we limit it to just inciting the dog to bark, it's not broad enough. There needs to be something in there that would prevent the defendant from calling the plaintiff's job or employer or taking other actions that don't necessarily – are not directed at the dog in particular but are directed [p. 596] at the plaintiffs personally and are directed to hurt them. So those would be my comments.

And as to C, I think filing any false claims even with the City of Thousand Oaks, we would use the word in the prayer for relief. The City of Thousand Oaks has an ordinance which I believe we have asked the Court to take judicial notice of which prohibits the filing of false complaints. So issuing an injunction in this respect is only basically being consistent with both the local ordinance and the Penal Code I think also prohibits the filing of false complaints. So just as added protection of putting in a court order prohibiting the filing of false claims.

THE COURT: Well, I am going to need a few minutes to think about appropriate orders and I will be back hopefully within about 10 minutes.

(Recess taken.)

THE COURT: Back on the record in the matter of Flores and Flores versus Gregory. And on this seventh cause of action, judgment shall be entered for the plaintiffs and against the defendant and injunctive – certain injunctive relief shall be awarded.

I do have generally the type of difficulties in dealing with a couple of the requests of the plaintiffs as pointed out by Mr. Redmond generally. A couple of the requests do not lend themselves to clear statement or clear definition or enforcement, and this court is not anxious to create any ambiguities between the parties or [p. 597] misunderstandings between the parties by those kind of ambiguities.

And so it would be my intention to order and enjoin the defendant from mailing or otherwise causing to be delivered by any manner to the plaintiffs at their residence or at any other place, any writing, audio or video document on or concerning any subject whatsoever, and directing that he shall not communicate or attempt to communicate with the plaintiffs by telephone or by any other means at any time in the future except through and directly to counsel for the plaintiffs, either Ms. Rasnow or any other person designated by her or by the plaintiffs.

Secondly, that the defendant shall be enjoined and ordered not to provoke or instigate or cause to continue the barking of any dog, including any dob [sic] or dogs

owned by the plaintiffs, but not limited to them. The intent of this would be to extend the obligation of the defendant on that subject to other animals within that neighborhood.

Thirdly, that the defendant be enjoined and ordered not to encourage or promote or request or participate in or effect personally or otherwise any citizen arrest of either plaintiff in this action.

Fourth, that the defendant be enjoined from and ordered to not file any new litigation against these plaintiffs or either of them or against – No, strike that – against the plaintiffs in this action in any of [p. 598] the courts of this state in propria persona without first obtaining leave of this court or the presiding judge of the court wherein the litigation is proposed to be be [sic] filed. And while this court will not attempt to enjoin the defendant from filing any complaints with regulatory agencies or law enforcement agencies, either by such a simple direction or as requested by the plaintiffs, that is without, quote, tangible evidence or a minimum of one independent witness corroborating the complaint.

The Court will also direct as a part of this injunctive relief that upon any report by the defendant of any complaint relating to any conduct, act or omission by the Floreses, that the agency and the officer or employee to whom that complaint is made, at the time of the making of the initial complaint, be presented by the defendant a copy of this judgment.

Those are the intentions of the Court regarding the injunctive relief.

Miss Rasnow.

MS. RASNOW: I thank the Court very much for the time that was put into the order and we not only accept it but we very much appreciate it.

THE COURT: If there are no other requests then by plaintiff on that subject, Mr. Redmond, any comments upon those orders as proposed?

MR. REDMOND: I guess a question or perhaps procedural. If, in fact, Mr. Gregory ever intends pro per to file civil action, what is the procedure he is supposed [p. 599] to follow to do so?

THE COURT: It would require a motion made to this court if the action was to be filed in the Superior Court of this county, or in my absence, a motion made to the presiding judge of this court. Or if the action was to be filed in any other court, including the small claims court, then an application to that presiding judge having jurisdiction or having the supervisory power over the jurisdiction of that individual court asking leave of the court for permission to file the action.

And just give me just a moment. And this particular part of the relief is prompted by those sections in the Code of Civil Procedure beginning at section 391 that have to do with vexatious litigant. I do not find on this record that the defendant is a vexatious litigant, I just look to those sections to give me some guidance as to what might be an appropriate order and type of injunctive relief.

So to answer your question more fully, I would refer you to section 391 et seq and therein – or your client, and

therein will be found provisions for motions on the part of a defendant to provide for security of continued litigation and the dismissal of the filed action if such security is not furnished.

I am not indicating in this verdict and award any requirement that security be furnished, I am just indicating that under 391.7, a vexatious litigant would be required to seek that leave of the court that I am talking [p. 600] about. And upon being granted that relief, it may well be that again independent of the defendant being characterized and found to be a vexatious litigant, it might be that a court permitting leave might require the furnishing of security. I don't know that, but that would be the method by which any action filed in propria persona would be available to the defendant.

MR. REDMOND: Just one further question on that, your Honor. Is that in effect an ex-parte motion?

THE COURT: Ex-parte motion?

MR. REDMOND: In other words, no notice to the other side.

THE COURT: I don't – I don't have any comments on that regard. It's a prefiling motion and request and I would, if it came before me, I would require at least ex-parte notice to the other party. How some other judge will react to it in some other county, I don't know. But that would be my reaction.

MR. REDMOND: Thank you.

MS. RASNOW: Your Honor, I am not fast enough at writing that down everything word for word. Is there a minute order I should use to prepare form of

judgment to reflect the court's order or should I request the expedited transcript from today's proceeding?

THE COURT: The minute order won't reflect all of the language, perhaps you might just ask to spend a moment with the court reporter and file in the blanks that you have. And if you need a transcript, of course, you can

• • •

EXHIBIT E

EXHIBIT E

Second Appellate District, Division Six, No. B087197
S049602

IN THE SUPREME COURT OF CALIFORNIA

JOSE R. FLORES Et Al., Respondents

v. (Filed Nov. 29, 1995)

CALVIN GREGORY, Appellant

Appellant's petition for review DENIED.

LUCAS
Chief Justice

(2)

No. 95-1789

In The

Supreme Court of the United States

October Term, 1995

CALVIN GREGORY, an individual; and DOES 1 through 50, inclusive,

Petitioners,

vs.

JOSE R. FLORES and GENIE FLORES, individually and as husband and wife,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of California

BRIEF IN OPPOSITION

TINA L. RASNOW AND ASSOCIATES
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Attorney for Respondents Jose R. Flores and Genie Flores

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of the Case

A. Nature of Action and Relief Sought

Respondents, Jose and Genie Flores, sued Petitioner, Calvin Gregory, for malicious prosecution, negligence, defamation, intentional infliction of emotional distress, negligent infliction of emotional distress, false arrest/ imprisonment and injunctive relief based on intentional false statements made by Petitioner to law enforcement and others. Respondents sued Petitioner for maliciously initiating a citizen's arrest and criminal prosecution of Respondent Jose Flores, for an alleged barking dog problem which Petitioner knew never existed. Respondent, sought, and received, an award of general damages, special damages, punitive damages, costs of suit and permanent injunctions. (CT Vol. 1-28 and Exhibit "B" to Petition for Writ of Certiorari ("Petition").)

B. Judgment of Superior Court and Appellate Review

The Superior Court of California, County of Ventura, Honorable Frederick A. Jones presiding, rendered its final judgment for Respondents on return of a jury verdict in the sum of $12,000, including $8,000 in punitive damages. Judge Jones further issued a permanent injunction to prevent Petitioner from further harassing Respondents. (See Exhibit "B" of Petition).

The Court of Appeal, Second Appellant District, Division 6 affirmed the verdict, and the California Supreme Court denied review.

C. Statement of Facts

In or about June, 1992, Respondents moved into a single family residence in the Wildwood community of Thousand Oaks, California, next door to Petitioner. Respondents owned a passive and well mannered dog. (See Appellate Opinion ("AO") at page 1, attached as Exhibit "A" to Petition).

Petitioner first confronted Jose Flores regarding the location in which Mr. Flores parked his truck on the street in front of his home. (AO pg. 2). Following this incident Petitioner mailed animal control literature and included messages about surgically debarking dogs, which alarmed Respondents. (AO pg. 3). The Flores investigated whether their dog created a problem by inquiring of other neighbors, observing the property from a nearby greenbelt, and setting up a sound activated tape recorder (*Ibid.*). Animal control also conducted an investigation and did not hear the dog bark. Seven neighbors signed a petition stating that the dog was quiet and in no way a nuisance to the neighbors. (*Ibid.*)

Petitioner insisted the dog "constantly barked and howled". He filed a complaint with the police department and insisted upon a citizen's arrest of Mr. Flores despite the arresting officer's warning that there was insufficient cause to make an arrest and that Petitioner could be civilly liable for doing so. Despite the admonitions from the arresting officer, Petitioner insisted on making the arrest in front of several of the Flores' neighbors. (AO pg. 4).

Mr. Flores had to retain an attorney and appear in criminal court, he and his wife were humiliated by press coverage and suffered a loss of sleep and severe headaches. The City Attorney eventually dismissed the action under California Penal Code Section 1385, subdivision

(a). (*Ibid.*) Testimony from a multiplicity of neighbors indicated a history on the part of Petitioner of making complaints about neighbors' dogs (AO pg. 4-5).

The evidence substantially showed, and the jury found, that the Flores' dog rarely barked: "Substantial evidence supported the jury finding that Gregory acted with malice and defamed respondents." (AO pg. 11).

ARGUMENT

I.

THERE IS NO FEDERAL QUESTION OR CONSTITUTIONAL ISSUE BEFORE THE COURT

Petitioner would have the United States Supreme Court retry the facts of this case to reach a different conclusion than that reached by the jury, namely that Calvin Gregory maliciously lied to police to have Mr. Flores arrested. After hearing from numerous witnesses on behalf of respondents, and no corroborating witness on behalf of petitioner, the jury concluded that the Flores' dog rarely barked, and that Mr. Gregory, acting with malice, knowingly filed a false police report in order to get even with his neighbor. (AO pg. 11).

False reports to police officers are not privileged, nor are they subject to First Amendment protection. As this Court stated in *McDonald v. Smith*, 472 U.S. 479, 105 S.Ct. 2787, 86 L.Ed.2d 384 (1985):

> Although the values in the right of petition as an important aspect of self-government are beyond question, it does not follow that the Framers of the First Amendment believed that the Petition Clause provided absolute immunity from damages for libel. (*Id.* at p. 483, 2790).

The *McDonald* Court, citing *White v. Nicholls*, 3 How. 266, 11 L.Ed. 591 (1845), stated:

> The Court, after reviewing the common law, concluded that the defendant's petition was actionable if prompted by "express malice," which was defined as "falsehood and the absence of probable cause." *Id.*, at 291. Nothing presented to us suggests that the Court's decision not to recognize an absolute privilege in 1845 should be altered; we are not prepared to conclude, 140 years later, that the Framers of the First Amendment understood the right to petition to include an unqualified right to express damaging falsehoods in exercise of that right. (*McDonald v. Smith, supra* at p. 484, 2790).

"The right to petition is guaranteed; the right to commit libel with impunity is not". (*Id.* at 485, 2791)

Petitioner's entire argument rests on a false premise, namely that the Flores' dog created a nuisance and therefore petitioner's arrest of respondent was privileged. However, the jury, based on overwhelming evidence, found to the contrary. The jury determined that Mr. Gregory had no reasonable basis to arrest Mr. Flores, and that his citizen's arrest was undertaken with malice and with the intent to defame and injure respondent. (AO pg 11). According to this Court in *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966), "[M]alicious libel enjoys no constitutional protection in any context". (*Id.* at p. 63, 663) Under numerous Supreme Court decisions, if a defamatory statement is made, with malice, the privilege claim is defeated. (See for example, *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964); *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979); *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978).)

As stated in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984), citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789 (1974), "There is 'no constitutional value in false statements of fact.' " (*Keeton* at p. 776, 1479)

II

THE INJUNCTION DOES NOT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHTS

The trial court issued a carefully tailored injunction upon finding that Petitioner knowingly and willfully engaged in a course of conduct that seriously alarmed, annoyed and harassed Respondents, and that Respondents actually suffered substantial emotional distress. (AO pg. 13). This conduct included filing false reports with animal control and the sheriff, denting the Flores' truck, placing Mr. Flores under citizen's arrest, and mailing threatening literature. (*Ibid.*) Petitioner has no constitutional right to harass respondents, lodge false reports with the police and the city, make unlawful arrests, contact respondents, or disturb their peace. (See *Rowan v. United States Post Office Department*, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970).).

III

CONCLUSION

Petitioner has misrepresented the facts of the case in an attempt to create a federal question, where none exists. This case is a simple neighbor dispute, which has no place in the nation's highest court. Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Dated: May 31, 1996

Respectfully submitted,

TINA L. RASNOW

(3)

No. 95-1789

In The

Supreme Court of the United States

October Term, 1995

CALVIN GREGORY, an individual; and DOES 1 through 50, inclusive,

Petitioners,

vs.

JOSE R. FLORES and GENIE FLORES, individually and as husband and wife,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of California

REPLY BRIEF

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BRIEF IN REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

INTRODUCTION

As Mr. Justice Rutledge put it in *Thomas v. Collins*, 323 U.S. 516 (1945) at page 530,

> The usual presumption supporting legislation is balanced by the indispensable democratic freedoms secured by the First Amendment. The priority give these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the *character of the right*, not the limitation, that determines what standard governs. (emphasis added.)[1]

The right at issue in this appeal is petitioner's right to petition his government for redress. The trial court places significant limitations on petitioner's ability to utilize his local court and communicate with local government officials. As a result, the injunction must be considered a prior restraint.

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[1] Respondents arguments miss the mark. Petitioner's appeal concerns only the constitutionality of the trial court's injunction and the inability to determine whether the jury's verdict was based on the exercise of constitutionally protected rights.

II.

THE TRIAL COURT'S INJUNCTION CONSTITUTES AN UNCONSTITUTIONAL PRIOR RESTRAINT

Justice Blackman in *CBS, Inc. v. Davis*, 114 S.Ct. 912 at page 914 (1994) citing this courts decision in *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976) stated:

> A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted . . . A prior restraint, by contrast, . . . has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint 'freezes" it at least for a time.

The danger of censorship in advance is that in attempting to prevent the commission of forbidden acts in advance, it will also prevent lawful exercise of First Amendment rights upon an erroneous (even plausible) finding in advance that the applicant intends to engage in unlawful conduct.[2] (*See American Civil Liberties Union v. Board of Education*, 55 C.2d 167, 179-180 (1961).)

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[2] Respondents attempt to sabotage the petition by stating irrelevant facts intended to undermine petitioner's character. It is, however, the character of the right that is important. (*See Thomas v. Collins, supra*, 323 U.S. at 530.) Respondents fail to acknowledge that they settled a cross-complaint filed by petitioner alleging that respondents committed 2 misdemeanors and a felony. As a condition of settlement, respondents signed a stipulation severely restricting their exercise of dubious behavior.

The trial court, anticipating that petitioner would engage in unlawful acts, has severely limited his ability to petition his local court and local government officials leaving petitioner an outsider to the legal process and forcing him to take the law into his own hands. This type of prior restrain is inconsistent with the founding fathers' intent in establishing the First Amendment and this court's long standing protection of said rights.

Petitioner recognizes that this case comes to the court with unorthodox facts. However, the federal courts have considered First Amendments rights so precious that the protections do not depend upon the notoriety of the issues (*Garrett v. Estelle*, Tex. 556 F.2d 1274 (C.A. 5 1977)) and are not limited to issues of great social and political impact. (*Jannetta v. Cole*, 493 F.2d 1334 (C.A. 4 1974))

III.

THE TRIAL COURT JUDGMENT MAY HAVE BEEN BASED ON CONSTITUTIONALLY PROTECTED ACTIONS

Respondents alleged and argued to the jury that it should award damages on the basis of actions that were constitutionally protected. A general verdict was returned. As a result, the great possibility exists that the verdict was unconstitutional as it was based on constitutionally protected actions.

IV.

CONCLUSION

The issues come before this court in an unusual fashion, but are nevertheless important. The exercise of First Amendment rights are cherished in this country and define the difference between this great country and the rest of the world. Petitioner respectfully requests that this court grant his petition. Thank you.

Respectfully submitted,

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